

Martingano v Herzog
2009 NY Slip Op 33095(U)
December 22, 2009
Supreme Court, Richmond County
Docket Number: 103912/07
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index. 103912/07
Motion No.:002**

**FRANCIS X. MARTINGANO and
MICHAEL SCHIRRIPA,
as shareholders of WOMEN’S HEALTHCARE SPECIALISTS,
MEDICAL PRACTICE, P.C., and
FRANCIS X. MARTINGANO and
MICHAEL SCHIRRIPA, members of
WHS REALTY, LLC.,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**DAVID HERZOG,
ALLEN HIRSCH,
WOMENS HEALTHCARE SPECIALISTS,
MEDICAL PRACTICE, P.C., and
WHS REALTY, LLC.,**

Defendants

The following items were considered in the review of the following motion for partial summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiff, Michael Schirripa moves pursuant to CPLR § 3212(e) for an order granting partial summary judgment in favor of the plaintiff. The plaintiff’s motion is granted to the extent that summary judgment is appropriate with respect to the David Herzog, M.D.’s contribution to Womens.Healthcare Specialists Medical Practice, P.C. (“WHS”) pension fund, and the settlement of litigation between Donald T. Morrish, M.D. and WHS.

Facts

This action arises out of the break up of a medical professional corporation. The plaintiffs seek an order granting summary judgment against the defendant, David Herzog, for the specific allegations set forth in the first cause of action in the Complaint in paragraph 18 subsections (a), (c), (e), (f), and (y) which state:

18. Defendant, David Herzog in gross violation of his fiduciary duties as an officer, director and shareholder of WHS, and in violation of the law, made numerous unilateral decisions, relying solely on his agent and defendant, Allen Hirsch, creating corporate waste and demonstrating gross negligence and gross mismanagement, including but not limited to the following:

(a) failure to pay WHS's payroll taxes in violation of federal, state and municipal law;

(c) failure to make all payments to fully fund the WHS's pension fund in violation of ERISA, and other laws, rules and regulations,

(e) failure to pay scheduled settlements of employment disputes triggering further litigation;

(f) failure to pay WHS's operating expenses;

(y) failure to pay answering service invoices . . .

Dr. Herzog left WHS on or about November 30, 2005. As a result of his leaving the practice the plaintiffs argue that the Herzog should pay the following amounts to the plaintiffs: 1) \$14,507.33 for 1/3 share of the negative cash balance in the professional corporation's bank account; 2) \$263,692.75 for 1/3 share of payroll liabilities; 3) \$110,666.66 1/3 share of the pension contributions; 4) \$104,508.32, for 1/3 share of note payments to Sovereign Bank as

successor in interest to Independence Community Bank; 5) \$131,000 for 1/3 share of the Berman and Morrish litigation settlements; and 6) \$1,667 for 1/3 of the settlement to D&B Mail Services. It is uncontested that Herzog had a 1/3 interest in WHS.

In support of the plaintiffs motion a number of documents are annexed to demonstrate their entitlement to summary judgment. First, the plaintiffs submit an email sent from the defendant Herzog to the plaintiffs in which he acknowledges his responsibility to contribute to payroll taxes, pension plan and legal fees incurred as a result of lawsuits with Drs. Donald T. Morrish and Scott Berman. To substantiate Herzog's liability with respect to his payroll contribution the plaintiffs submit a spreadsheet that details check numbers and amounts paid to both the United States Treasury and New York State. However, the plaintiffs fail to annex the cancelled checks evidencing payment to the United States Treasury and New York State.

Next, to substantiate the amount due and owing for contributions to WHS's pension fund the plaintiffs submit a cancelled check dated December 30, 2005 from Independence Community Bank bearing check number 1288 drawn on an account in the name of Women's Healthcare Specialists Medical Practice, P.C. in the amount of \$332,000 for the pension contribution.

Additionally, the plaintiffs submit another spreadsheet that indicates that Dr. Schirripa and Dr. Martingano each loaned WHS \$170,000 for a total loan of \$340,000. In an attempt to support this figure the plaintiffs submit the MBNA credit card statement from Michael A. Schirripa, M.D. that indicates a direct deposit balance transfer in the amount of \$80,000 taken on December 2, 2005. Additionally, the plaintiffs annexed documentation that indicates that Michael A. Schirripa, M.D. transferred another balance from Chase on September 6, 2006 in the amount of \$30,000. Furthermore, the plaintiffs annex checks drawn from Michael A. Schirripa's personal checking account with SI Bank & Trust in the amounts of: \$6,500 dated December 19, 2006 and \$28,000, dated February 17, 2007, and \$4000 dated February 20, 2007. None of the checks submitted to the court are duplications of cancelled checks. Furthermore, there is no attempt to substantiate the \$170,000 allegedly loaned to WHS from Dr. Martingano even though

statements are made that Dr. Martingano liquidated his children's college funds.

To support their claims with respect to the outstanding note held by Independence Community Bank the plaintiffs submit an Independence Community Bank statement dated approximately December 1, 2005, which shows that WHS owed \$210,871.36 on or about the time Herzog left WHS. Also, the affirmation of plaintiffs counsel indicates that in addition to the note held by Independence Community Bank, there were two separate Independence Community Bank accounts totaling an indebtedness of \$347,236.10. To substantiate this claim the plaintiffs annex a statement from an Independence Community Bank account bearing account number 0001249312, dated November 30, 2005, that shows a total outstanding balance was \$136,315.62. An additional statement from Sovereign Bank bearing account number 6829000254, dated May 31, 2009, shows a balance of \$34,060.09. However, when these accounts are added together they equal \$381,247.07. This calculation includes the separate note executed by WHS and held by Sovereign Bank as successor in interest to Independence Community Bank.

Finally, the plaintiffs submit a general release executed by Donald T. Morrish, M.D. indicating the lawsuit brought by him against WHS settled in the amount of \$168,000 and a Settlement agreement signed by Michael Schirripa and Francis Martingano that settled the litigation between Scott Berman, M.D. and WHS. The settlement agreement is signed by both Schirripa and Martingano on behalf of WHS and settled the litigation for a payment of \$8000 as well as:

WHS represents that, pursuant to the employment agreement between WHS and Berman, WHS acquired "claims made" malpractice insurance coverage for Berman, and, therefore, after Berman's employment with WHS ended, WHS was required to obtain extended professional liability reporting coverage ("Tail Coverage") on Berman's behalf. For the purpose of providing such Tail Coverage, WHS has already made partial payments to Medical Liability Mutual Insurance Company ("MLMIC") in the amount of \$38,855.00, which was paid in September 2006, and in the amount of \$45,071.00, which was paid in December 2006. WHS agrees to

make an additional payment to MLMIC for the Tail Coverage in the amount of \$41,962.00 on or before April 18, 2007 (the “Final Installment”). WHS shall provide proof to Berman that such payment was tendered to MLMIC on or before the date it is due under the Paragraph 1(a)(iii), and provide copies to Berman of all written communications with, or notices from, MLMIC relating to Berman or the Tail Coverage in accordance with the notice provisions herein. WHS shall also provide Berman with notice of any and all claims made by third parties related to Berman’s employment with WHS and/or services provided by Berman while employed with WHS.

In that same bundle of documents there is a letter from Arent Fox PLLC stating “enclosed is our invoice for services rendered”. Following that letter is a check from WHS in the amount of \$75,000 to Arent Fox PLLC, but there is no invoice annexed nor is there any indication as to why the check was written. Completing the evidence submitted by the plaintiffs for outstanding litigation expenses is an unexecuted stipulation of settlement allegedly ending litigation between D&B Mail Services, Inc. d/b/a Always at Your Service Answering Service in the amount of \$5000.

Discussion

In the interest of judicial economy, this court will overlook the procedural error committed by the plaintiff in failing to annex copies of the summons and complaint and answer in this action. The court will consider this motion on its merits. A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion.”¹ Summary judgment should not be granted where there is any doubt as to the existence

¹ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

of a triable issue or where the existence of an issue is arguable.² As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.³ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁴ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁵

The plaintiffs have come forward with sufficient evidence demonstrating an entitlement to summary judgment on the issues of payment to WHS's pension fund and the settlement with Donald T. Morrish, M.D. It is clear on the evidence presented that WHS paid the amount of \$332,000 to fund the WHS pension fund. As such, Herzog is required to contribute 1/3 to that fund. Accordingly summary judgment is appropriate in that Herzog shall pay \$110,666.66 to the plaintiffs.

With respect to the settlement of the litigation brought by Donald T. Morrish, M.D. the general release executed by Dr. Morrish ending the litigation with WHS clearly states the sum of \$168,000. As such, summary judgment is appropriate in that Herzog shall pay \$56,000 representing his 1/3 share. Similarly, the settlement agreement ending the litigation brought by Dr. Scott Berman states a sum of \$133,888 which comprises an \$8,000 cash payout along with \$125,000 to be paid in the form of insurance premiums. Accordingly, Herzog shall pay \$41,965.33 representing his 1/3 share in the settlement.

² *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

³ *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁴ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

⁵ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

With respect to the other items for which summary judgment is sought, the evidence presented is inadequate to support such a finding. As such, the plaintiffs' motion is denied in all other respects.

Accordingly, it is hereby:

ORDERED, that the plaintiffs' motion for summary judgment is granted to the extent that the defendant, David Herzog, M.D. is liable for 1/3 of the contribution to WHS's pension fund in the amount of \$110,666.66; 1/3 of the final settlement ending the litigation brought by Donald T. Morrish, M.D. in the amount of \$56,000; and 1/3 of the final settlement ending the litigation brought by Scott Berman, M.D. in the amount of \$41,965.33 and it is further

ORDERED, that the plaintiffs' motion is denied in all other respects with leave to renew with proper back-up documents to support the assertions by counsel and his clients; and it is further

ORDERED, that parties shall return to DCM Part 3 on **Friday, January 15, 2009 at 10:00 A.M.** for a compliance conference.

ENTER,

DATED: December 22, 2009

Joseph J. Maltese
Justice of the Supreme Court